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Supreme Court of the United States

OCTOBER TERM, 1930.

No. 543.

MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY,
Petitioner,

vs.

NOAH MOQUIN,
Respondent.

PETITIONER'S BRIEF IN OPPOSITION TO THE MOTION TO DISMISS THE WRIT.

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This Court limited the review under the writ to the question arising from the failure of the State Court to grant a new trial in a case under the Federal Employers' Liability Act where the verdict was obtained by appeals to passion and prejudice.

(1)

Respondent's motion papers give a wrong impression of this proceeding by asserting (p. 15) that "the Supreme Court of Minnesota had no difficulty in finding the defendant company liable," and that "there is no question but that the defendant is liable in some amount," as if the amount of damages alone were in question.

The State Court gave no indication that it found petitioner liable otherwise than because it was "*committed*" to

respondent's version by the verdict of the jury (R. 673). Respondent's version was that ice over the rails caused the derailment and rendered petitioner liable for respondent's injury.

Respondent's version was not the only one which could be accepted. His brief (p. 8) opposing our petition for certiorari declared that "The main controversy at the trial was over the question of whether there *was* ice over the rails." His present motion papers (p. 6) refer to the fact that "*three disinterested witnesses* testified that there was ice over the rails at the point of derailment and defendant brought in three or four employes to testify that there was *no ice* over the rails."

Thus there was a question whether ice existed over the rails, a negative answer to which would exclude the theory advanced to establish petitioner's liability. The State Court did not indicate any opinion that the evidence required that question to be answered in the affirmative. It was never passed on in any way by the court, but only by the jury which acted under the influence of passion and prejudice deliberately aroused by respondent's counsel.

(2)

Little notice need be taken of counsel's assertions that our petition misrepresented what was said to the jury. Their only attempt to give color to that charge consists in the following distortion of one of the many quotations which the petition (p. 21) made from counsel's improper remarks.

The petition (p. 21) stated that respondent's counsel

> "represented *railroad companies* generally as trying to fasten on *injured men* fighting for their rights in Court that *they* are perjurers and liars." (Italics ours.)

The motion papers (p. 4) assert that in making that statement we

> "would lead the Court to believe that counsel had called *railroad witnesses* perjurers and liars." (Italics ours.)

Such flagrant distortion needs no further comment.

The motion papers (p. 5) undertake to justify counsel's argument to the jury that petitioner was attempting to fasten the charge of perjury on respondent, on the ground that petitioner produced witnesses who testified that there was no ice over the rails when respondent had testified that there was. Every lawyer knows the difference between charging a man with perjury and producing witnesses whose testimony differs from his.

Counsel assert (p. 5) that respondent "could not have been mistaken" as to what he saw. That was for the jury to determine uninfluenced by any false impression that there was a charge of perjury against him which they would be supporting if they did not accept his testimony as conclusive.

Similarly the motion papers (p. 6) attempt to justify counsel's statement to the jury that he had never seen "as ingenious and dishonest a defense as is put up in this case" on the ground that petitioner produced several of its employes who contradicted the testimony of respondent's "three disinterested witnesses" that ice covered the rails. That could not justify characterizing the *defense* as being *ingeniously dishonest*. That charge should be considered in connection with counsel's insinuation to the jury that petitioner's counsel "prepared" the witnesses to give false testimony (Petition, p. 21). None of counsel's charges and insinuations of that character had any foundation. Taken together they were calculated to arouse passion and prejudice

against respondent and its counsel.

The motion papers make no attempt to controvert or justify the many other improper remarks of counsel quoted in our petition which tended to inflame the jury with passion and prejudice.

(3)

Counsel assert (p. 11) that even if "the argument was the most vicious and prejudicial one imaginable" local rules of practice would be applicable. That completely ignores the protection afforded by this Court, in cases under this Act, in refusing to allow "substantive rights to be impaired under the name of procedure."

Atlantic Coast Line R. R. vs. Burnette, 239 U. S. 199.
Central Vermont Ry. Co. vs. White, 238 U. S. 507.

It is our view that obtaining verdicts under this Act by vicious and prejudicial arguments which impair a party's substantive right to a fair determination of its liability would not be tolerated by this Court, even if sanctioned by local rules of practice. Indeed, it may be prohibited by Amendments V and XIV to the Federal Constitution against taking property without due process of law.

Counsel's assertion that the question is "purely one of local practice" (pp. 2, 16) ignores our contention that the *verdict was vitiated* by passion and prejudice of the jury as a result of counsel's efforts to arouse those improper influences.

The practice to which they refer is against ordering a new trial on account of misconduct of counsel *per se* when, as in this case, it was not objected to at the time it occurred. It does not apply where a new trial is sought, as here, on the ground that the *verdict reflects* the misconduct of counsel.

Counsel attach unwarranted significance to the Court's allusion to the absence of immediate objection to their misconduct to "protect the record" according to the "settled practice" (R. 676, 677). In that paragraph of its opinion the Court seemed to assume that error was assigned against counsel's misconduct *per se*, which was not the case.

However, in the concluding paragraph of its opinion the Court reduced the verdict as being excessive because of passion and prejudice (R. 678). In so doing it necessarily held that the "settled practice" which it had previously mentioned was immaterial to granting relief because of passion and prejudice actually reflected in the verdict itself. Since the "settled practice" did not prevent the Court from reducing the verdict on that account, it did not prevent setting it entirely aside for the same reason.

That was recognized in *Hanskett vs. Broughton*, 157 Minn. 83. There too an excessive verdict was obtained by appeals to passion and prejudice which were not objected to at the time, except for denials and retorts (p. 86). The Court pointed out that the misconduct in itself was not assigned as error and "would not have been for consideration" (p. 88). Nevertheless, it ordered a new trial.

The Court explained in denying a petition for re-argument that the order for a new trial was

> "predicated solely upon our conclusion that the verdict seemed excessive and that its size may have been due to misconduct of counsel,"

and that

> "Its seemingly excessive character, coupled with the conduct of counsel, made a *combination* which required a new trial, as the opinion states, in the interest of the proper administration of justice." (Italics ours.)

The existence here of that same *combination*, an award of excessive damages combined with misconduct of counsel in appealing to the jury's passion and prejudice, shows that we are not attempting to overthrow the practice of merely reducing the damages in cases where the size of the verdict *alone* suggests the influence of passion and prejudice.

Where counsel did not appeal to such influences it is possible to assume that the jury first impartially determined the question of liability and that passion and prejudice were not aroused until it subsequently came to decide the amount of damages. But where those emotions were inflamed by counsel before the jury began its deliberations, and are found still in control when it reached the ultimate question of damages, it would be *preposterous* to assume that they were subdued in the interim so as to determine the question of liability fairly and dispassionately.

Thus the applicable "settled practice" of Minnesota was that described in *Arrell vs. Davies*, 171 Minn. 472, as follows:

> "when a verdict is excessive and it is probable that the jury were influenced by passion and prejudice in the determination of other issues, a new trial should be granted."

That principle is also recognized in the Federal Courts. *Arkansas Cattle Co. vs. Mann*, 130 U. S. 69; *Gila Valley Ry. Co. vs. Hall*, 232 U. S. 94. In the latter case this Court approved the following statement (p. 105):

> "if it appears that the verdict is tainted with prejudice or passion, and does not represent the dispassionate judgment of the jury upon the question of the right of the plaintiff to recover, a new trial should be granted."

In the present case Mr. Justice Stone of the Minnesota Supreme Court, in holding that the vice in the present ver-

dict was not cured by the Court's reduction of damages, stated that (R. 678):

> "we are refusing defendant the right to trial by another jury which, it is to be presumed, would try *all* the issues fairly. * * * We find in the verdict plain evidence of the influence on the jury of passion and prejudice and in the argument of counsel for plaintiff its probable source. Yet we grant to the aggrieved party but a small part of the relief such a combination normally demands."

CONCLUSION.

Since the State Court found the verdict excessive because of the jury's passion and prejudice, and since the unmistakable source of that passion and prejudice was in counsel's misconduct before the jury began its deliberations, it is manifest that we did not have a fair trial of the question of our liability according to the common law enforced in the Federal Courts and a new trial should be ordered.

We respectfully submit that the motion to dismiss should be denied and request that if the Court sees fit to transfer the case to the summary docket it be set for argument not earlier than April 14th.

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January, 1931.